If the defendant is obliged to so withhold, that would be a complete answer to the plaintiff's residual claim in this action. But if the defendant is not, then the plaintiff's claim must succeed despite the fact that the defendant had paid the sum to the Inland Revenue Department.

In this connection, counsel for the defendant conceded that the commission earned by the plaintiff did not fall under s 4A(i) and (iii) of the Act. In view of the similarity of the description, this must also mean that it does not come under s 109B(1)(a) and (c) thereof. The question then is: Does it come within category (b) of s 109B(1) of the Act? So far as is relevant, s 109(1) provides:

> Where any person (in this section referred to as 'the payer') is liable to make payments to a non-resident –
>
> (a) ...
> (b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or
> (c) ...
>
> which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and (whether or not that tax is so deducted) shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General:
> Provided ...

I have earlier on in this judgment dealt with the nature of the plaintiff's claim. It is commission arising out of a charterparty relating to the vessel MV 'Jeta' payable to the plaintiff, the payment of which was originally the responsibility of Forison Lines Pte Ltd but was subsequently undertaken by the defendant company which purchased the said vessel. It is obvious that the commission payable is not for technical advice rendered. But even if the said sub-s (1)(b) extends to 'assistance or services' of a non-technical nature, there is no evidence that the amount claimed is 'in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme'. There is nothing to indicate or suggest that the plaintiff had been involved in any technical management or administration or that the commission earned was in respect of any specialized or technical services rendered.

Furthermore and strictly on a point of evidence, it has not been indicated that the commission claimed was deemed to be derived from Malaysia under s 15A of the Act because there is no evidence suggesting that at the material times the management and control of the business or businesses or affairs of the defendant company were exercised in Malaysia. (Section 8(1)(b) and (c) of the Act.) Nor has evidence been adduced or reliance placed suggesting that condition (iii) of s 15A of the Act is applicable.

On the evidence and materials available, the defendant has failed to satisfy me on a balance of probabilities that there exists any arguable or triable issue or that for some other reason there ought to be a trial respecting the balance of the plaintiff's claim in this action. Accordingly, the application succeeds. There will be judgment for the plaintiff against the defendant in the sum of S$9,518.33 being balance of the plaintiff's claim with interest at 8% pa from today until payment and costs to be taxed unless agreed.

Application allowed.

Solicitors: *Battenberg & Talma*; *Lau & Co.*

Reported by *Ng Sheau Jiuan*

Kwong Yik Finance Bhd v Mutual Endeavour Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C2-23-3353-86
SITI NORMA YAAKOB J
10 AUGUST 1988

Banking – Guarantee – Loan secured by charge on property and guarantee – Whether creditor could proceed against guarantor before foreclosure of charged property finalized – Action in personam under contract of guarantee distinct from action in rem – No abrogation of plaintiff's right in charge document to elect which security it wished to realize

Contract – Guarantee – Loan secured by charge on property and guarantee – Whether creditor could proceed against guarantor before foreclosure of charged property finalized – Action in personam under contract of guarantee distinct from action in rem – No abrogation of plaintiff's right in charge document to elect which security it wished to realize

The plaintiff granted a loan to the first defendant upon the securities of a legal charge on a piece of property belonging to the second defendant, and a joint and several guarantee of both the second and third defendants. Following their defaults, the plaintiff applied for summary judgment against the first defendant as the principal debtor and the second and third defendants as guarantors. The application was allowed and the defendants appealed against that decision of the senior assistant registrar. In the appeal, the second and third defendants contended that the plaintiff could only proceed against them if there was a shortfall in the proceeds of sale realized by the foreclosure of the second defendant's charged property.

Held, dismissing the appeal:

The guarantors' liabilities were personal liabilities and were in no way affected by the charge created by the second defendant in favour of the plaintiff. In any event, the presence of cl 28 in the charge documents, which sought to cover the

situation where the proceeds of sale were insufficient to satisfy the amount due on the loan agreement, did not abrogate the right of the plaintiff to elect which of two securities it wished to proceed on.

Cases referred to

1 *Ng Yik Seng & Anor* v *Perwira Habib Bank Malaysia Bhd* [1980] 2 MLJ 83 (distd)
2 *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani* [1986] 1 MLJ 16 (folld)

KB Thuraisingham for the defendants/appellants.
Jean Chong for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: On 11 October 1985, the plaintiff signed a loan agreement with the first defendant, granting a fixed term loan of $200,000 to the first defendant, which was secured by a first legal charge on a piece of property belonging to the second defendant, and the joint and several guarantee of both the second and third defendants.

The guarantee was executed the same day as the loan agreement and the charge registered three days later on 14 October 1985.

Following their defaults, the plaintiff filed this action against all three defendants on 11 October 1986, exactly a year after the execution of the loan agreement and the guarantee and on 24 March 1986, the senior assistant registrar allowed the plaintiff's application for summary judgment under O 14 for the sums claimed against the first defendant as the principal debtor and the second and third defendants as guarantors.

In the appeal before me, only one issue was raised, namely, that the plaintiff can only proceed against the second and third defendants if there has been a shortfall in the proceeds of sale realized by the foreclosure of the second defendant's charged property. Since the foreclosure proceedings are still pending and the sale not finalized, the defendants contend that the plaintiff's conduct in enforcing the guarantee against the second and third defendants is premature. As such the right to sue them has not arisen yet.

From the manner of the arguments, it is very clear that only the liabilities of the second and third defendants are disputed and as far as the first defendant is concerned, it is not questioning its liability under the loan agreement.

The second and third defendants placed much reliance on the decision of *Ng Yik Seng & Anor* v *Perwira Habib Bank Malaysia Bhd*[1] where on facts somewhat similar, Chang Min Tat FJ had held that a claim against a guarantor might turn out to be a useless piece of litigation where the charge could be realized to meet the overdraft. This decision, however, has since been scrutinized by the Supreme Court in *Bank Bumiputra Malaysia Bhd* v *Esah bte Abdul Ghani*[2] where it held that what Chang Min Tat FJ had stated in *Ng Yik Seng's* case[1] 'was merely obiter dictum. It has no bearing on the facts of that case which was concerned merely with the question of whether the learned judge was right to give the appellant conditional leave to appeal'. The Supreme Court further held that 'the guarantor has no special right to demand that the creditors call upon the principal debtor to pay off the debt before asking the guarantor to pay'.

Since the second and third defendants are sued as guarantors, whatever rights and liabilities they have acquired must come within the four corners of the guarantee. Their liabilities are personal liabilities and are in no way affected by the charge created by the second defendant in favour of the plaintiff. As the chargee, the plaintiff is at liberty to seek the directions of the court or the Land Administrator regarding the sale of the second defendant's land to offset the amount due to it. This is an action in rem and very distinct from the action in personam available under the contract of guarantee against the second and third defendants. In any event the presence of cl 28 in the charge documents, which seeks to cover the situation where the proceeds of sale are insufficient to satisfy the amount due on the loan agreement, in which case the second defendant, as chargor, is expected to meet the difference, does not abrogate the right of the plaintiff to elect which of two securities it wished to proceed with.

In this case the auction of the charged property has been called off twice and this may well have prompted the plaintiff to enforce the guarantee. This, I maintain the plaintiff is entitled to do. Just as the guarantors have no right to demand that the plaintiff creditor calls upon the first defendant, as the principal debtor, to settle the debt before asking them, the guarantors, to pay, they too have no right to insist that the plaintiff sell off the charged property first to offset the debt before suing them on the guarantee. The plaintiff has the option to exercise which of two securities it wishes to enforce. It may even enforce both securities, as is done in this case, if it is found that one security is insufficient to settle the debt and it was to meet this eventuality that the plaintiff had in its wisdom insisted upon two forms of security, the charge as well as the guarantee.

On that finding, I had dismissed the defendants' appeal with costs.

Appeal dismissed.

Solicitors: *Clough Thuraisingham & Co*; *Soo Thien Ming & Shahrizat.*

Reported by *Ng Sheau Jiuan*